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No. 86-1614

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

DOROTHY A. GRAHAM, as The Executrix of
The Estate of James M. Graham, Deceased,
Petitioner,

VS.

TELEDYNE-CONTINENTAL MOTORS, a Division
of **TELEDYNE INDUSTRIES, INC.**, and **THE**
NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents.

ON PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit's affirmation of the district court's denial of plaintiff's/petitioner's injunction barring the National Transportation Safety Board from conducting an aircraft accident investigation is in conflict with other jurisdictions or of such importance as to require this Court's review.

2. Whether the Court of Appeals for the Ninth Circuit's interpretation of 49 C.F.R. Subsection 831.9(a) and Subsection 831.10(a) as permitting the National Transportation Safety Board to exclude from participating or observing aircraft accident investigations, those who are neither authorized nor who would add to the investigation is in conformance with the National Transportation Safety Board's congressional safety mandate.

3. Whether the Court of Appeals for the Ninth Circuit appropriately determined that a civil litigant's right to indemnification and/or contribution are not significantly impacted by the discretionary exclusion of its retained expert by the National Transportation Safety Board from the Board's investigation.

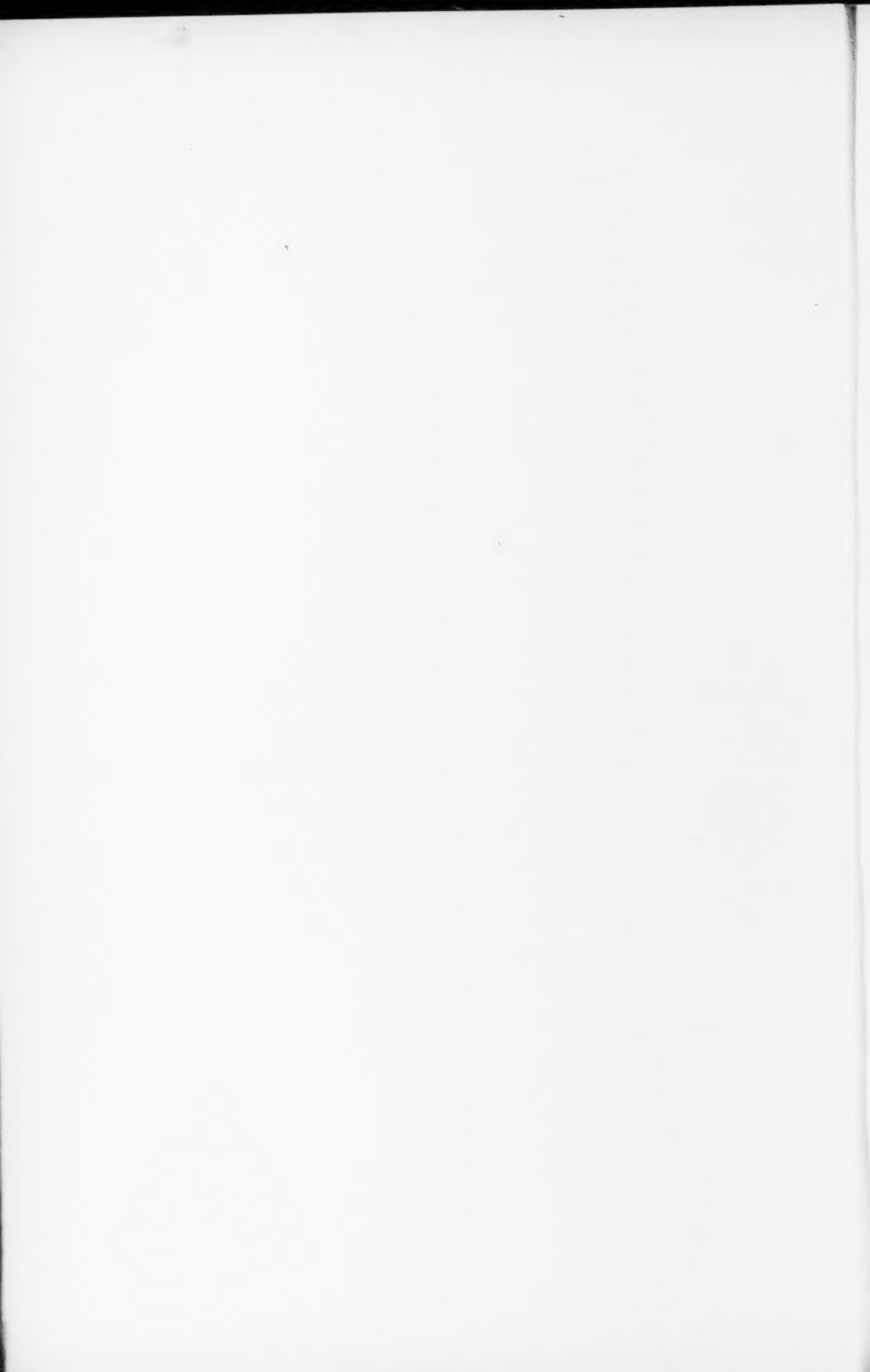


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DOROTHY A. GRAHAM, as The Executrix of
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vs.

TELEDYNE-CONTINENTAL MOTORS, a Division
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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

TO: The Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States

Respondent, Teledyne Continental Motors, aircraft
products division, a division of Teledyne Industries, Inc.,
respectfully requests that this court deny the Petition for
Writ of Certiorari seeking review of the judgment and
opinion of the United States Court of Appeals for the Ninth
Circuit, decided and entered on December 10, 1986, and as
amended on denial of rehearing and rehearing en banc on
February 11, 1987.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, statutes, and regulations involved are set forth in this brief, *infra*. The provisions involved are: 49 U.S.C. Section 1903(a)(1); 49 U.S.C. Section 1903(b)(2); 49 U.S.C. Section 701; 49 U.S.C. Section 1441(a); 49 U.S.C. Section 1441(c); 49 C.F.R. Sections 831.9(a), 831.10(a), 835.3 and 8445.50.

STATEMENT OF THE CASE

At approximately 8:30 p.m. on December 23, 1985, a twin engine Beechcraft Baron, number N1494G, purportedly piloted by James Graham crashed into the Sun Valley Mall in Concord, California. There were numerous injuries, fatalities and extensive property damage as a result of this accident.

The National Transportation Safety Board (NTSB) is investigating this accident. On orders from the National Transportation Safety Board, specifically those of the investigator in charge, the engines of this aircraft were sent to Teledyne Continental Motors, Aircraft Products Division's, (Teledyne) facility in Mobile, Alabama. Said engines arrived at the facility on approximately January 7, 1986. The engines were transported to this facility in order to utilize the expertise and specialized facilities of the engine manufacturer in an NTSB directed tear down of the engines.

Petitioner, Estate of Graham, (Graham) sought to have their retained expert Mr. James Jensen present at various aspects of the engine tear down and investigation of this crash. The NTSB pursuant to their discretionary authority

denied participation of Graham's expert during the investigative phase of this incident.

On January 8, 1986 Petitioner Graham filed a complaint for injunctive relief in the United States District Court for the Northern District of California seeking, *inter alia*, a temporary restraining order prohibiting the tear down and analysis of the engines unless their retained expert was present. A hearing on Petitioner's motion for a temporary restraining order was conducted on January 9, 1986 before the Honorable Marilyn H. Patel, United States District Judge for the Northern District of California. After oral argument by all parties, the District Court denied the Estate of Graham's Application for a Restraining Order. (Appendix A-10-11)¹

Following the denial of the above application, Graham sought a temporary restraining order in the Superior Court of the State of California, County of Contra Costa and in addition, filed a Notice of Appeal in the District Court and an Emergency Motion for an Order Granting Injunction during pendency of Appeal or Writ of Mandate in the United States Court of Appeals for the Ninth Circuit. The Complaint in the Superior Court of the State of California was removed by the NTSB and Teledyne to the United States District Court, Northern District of California and was later referred to Judge Marilyn H. Patel as a related action. On January 21, 1986, the Court of Appeals granted Petitioner's Emergency Motion enjoining Respondents from certain testing pending briefing and oral argument. The United States Court of Appeals for the Ninth Circuit issued its opinion denying Graham's appeal and affirming the

¹ References to Appendix A refer to the appendix attached to Petitioner's brief.

district court's denial of the restraining order on December 10, 1986 and amended its opinion upon denial of rehearing and rehearing en banc on February 11, 1987. Subsequent thereto, Graham filed an Emergency Motion for Stay of Mandate and Stay of Enforcement of Judgment with the Court of Appeals for the Ninth Circuit which was denied on March 4, 1987. Petitioner also filed a Motion for Reconsideration of Order re Stay of Enforcement of Judgment which was denied and mandate has issued by the Ninth Circuit Court of Appeals.

Subsequently, Petitioner sought a Stay of Enforcement of Judgment and Writ of Injunction pending Petition for Writ of Certiorari before the Honorable Sandra D. O'Connor which was denied on February 27, 1987 and renewed this Motion before the Honorable William H. Rehnquist, Chief Justice for the United States Supreme Court which was denied on March 9, 1987.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES INVOLVED IN THIS MATTER DO NOT MEET THE CRITERIA FOR THIS COURT'S REVIEW.

A. The Court of Appeals for the Ninth Circuit's decision does not conflict with prior federal court of appeals decisions.

1. The Court of Appeals for the Ninth Circuit has properly interpreted the discretionary provisions of 49 C.F.R. Section 831.9(a) and Section 831.10(a).

The Court of Appeals for the Ninth Circuit determined that 49 C.F.R. Sections 831.9(a)² and 831.10(a)³ govern

² 49 C.F.R. Section 831.9(a) Parties to the field investigation.

(a) The investigator-in-charge may, on behalf of the Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations, designate parties to participate in the field investigation. Parties to the field investigation shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel to actively assist in the field investigation. (44 F.R. 34418, June 14, 1979 as Amended at 49 F.R. 32852, August 17, 1984).

³ 49 C.F.R. Section 831.10(a) Access to and release of aircraft wreckage, records, mail and cargo.

(a) Only the Board's accident investigation personnel and persons authorized by the investigator-in-charge, the Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations to participate in any particular investigation, examination or testing shall be

who will participate in the investigation and who will have access to aircraft wreckage. The above sections were found to be permissive in authorizing the investigator-in-charge to designate certain parties to the investigation. The Court found that the NTSB had not abused its discretion by deputizing Teledyne and refusing to accord the Estate of Graham's representative that same status. The Court further found that:

"The use of Teledyne's facilities and expertise in disassembling its own engines could be indispensable in enabling the NTSB to carry out its mission.", (A-6)

which is:

" 'to investigate or cause to be investigated (in such detail as it shall prescribe) and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any — (A) aircraft accident . . . ' 49 U.S.C. Section 1903(a)(1)(1982)."
(A-6)

In similar proceedings in 1984 before the D.C. Circuit a nonmanufacturer, engaged in representing aircraft manufacturers in NTSB accident investigations asserted a right under the agency's regulations and a purported property interest protected by the due process clause entitling it to serve as the agent for parties in NTSB investigations. In each instance, the D.C. Circuit denied the stay motions. Its orders stated that the Petitioners had failed to show a likelihood of success on the merits. Thereafter, the NTSB successfully moved for dismissal of the appeals as moot.

permitted access to aircraft wreckage, records, mail, or cargo which is in the Board's custody. (44 F.R. 34418, June 14, 1979, as amended at 49 F.R. 32853, August 17, 1984).

Aerospace Management International v. National Transportation Safety Board, 85-1080 (D.C.Cir., Feb. 13, 1985) (order denying stay pending judicial review) and *Aerospace Management International v. National Transportation Safety*, 85-1428 (D.C.Cir., July 25, 1985) (order denying stay pending judicial review.) Petitioner's have completely failed to demonstrate the existence of circuit conflicts requiring this court's review under United States Supreme Court Rule 17(a).

B. The Court of Appeals for the Ninth Circuit's Decision is in conformity with the safety mission, purpose and requirements of the National Transportation Safety Board and does not require intervention by this Court to produce settled law on an issue of national importance.

Petitioner has failed to demonstrate that the issues involved are of such national importance as to require this Court's intervention. Whereas certiorari was granted in *Parker v. Flood*, 98 S.Ct. 2522, 2524, 473 U.S. 584, 57 L.Ed. 2d 451 (1978) in which the lower court's ruling had a potentially debilitating impact on the rapidly expanding national computer "software" industry and in *Exxon Corp. v. Wisconsin Dept. of Revenue*, 100 S.Ct. 2109, 2118, 447 U.S. 207, 65 L.Ed. 2d 66 (1980) which involved questions of whether a state could impose its own apportionment formula on a vertically integrated national company despite the Due Process Clause and Commerce Clause, it should not be granted in the instant matter.

The Court of Appeals for the Ninth Circuit's decision that a governmental agency's safety mission takes precedence over a litigant's desire to participate in the

investigation of the accident promotes safety, governmental efficiency, and fairness. It neither negatively impacts an industry nor conflicts with the purposes of the agency's enabling act.

1. **The pertinent NTSB regulations were properly promulgated to promote the investigation of the facts, conditions, circumstances and causes of any aircraft accident.**

Title 7 governs the investigation of accidents involving civil aircraft. Specifically,

"Section 701. [72 stat. 781, as amended by 76 stat. 921, 49 U.S.C. Section 1441](a) It *shall* be the duty of the National Transportation Safety Board to -

- (1) *Make rules and regulations governing notification and report of accidents involving civil aircraft;*
- (2) *Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;*
- (3) *Make such recommendations to the secretary of transportation as, in its opinion, will tend to prevent similar accidents in the future;*
- (4) *Make such reports public in such form and manner as may be deemed by it to be in the public interest; and*
- (5) *Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by conducting special studies and investigations on matters pertaining to safety in*

air navigation and the prevention of accidents.”

[Emphasis added]

Title 7 further permits the NTSB to conduct whatever investigation is necessary to fulfill its duties. [49 U.S.C. Section 1441(c).]

“... In carrying out its duties under this subchapter, the National Transportation Safety Board *is authorized to examine and test to the extent necessary any civil aircraft, aircraft engine, propeller, appliance, or property aboard an aircraft involved in an accident in air commerce...*”

The plain meaning of this language is that the NTSB *must* investigate all crashes and test any part to any degree necessary, to insure the prevention of similar accidents in the future.

2. **Fulfillment of the above mission precludes participation in NTSB accident investigations by personnel who cannot add unique, specialized knowledge or expertise.**

The Court of Appeals for the Ninth Circuit concurred that the NTSB's mission and duty were safety related (A-6):

Appellants attempt to impose upon the NTSB investigation rules of procedural fairness reflects a misconception of the Board's mission. The NTSB's authorizing statute provides that the Board shall “investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable causes of any...

aircraft accident.” 49 U.S.C. Section 1903(a)(1) (1982).

Petitioner's have failed to demonstrate how the question of excluding a single litigant's retained expert is of such unusual importance as to require a hearing by this Court. *United States v. Martorano*, 620 F.2d. 912 (1st Cir. 1980) *cert. denied*, 101 S.Ct. 356, 449 U.S. 952, 66 L.Ed. 2d 216 (1980); *United States v. Lynch*, 690 F.2. 213 (D.C. Cir. 1982). The NTSB has and continues to investigate civil aircraft accidents in an attempt to promote aviation safety. Petitioners have not and cannot demonstrate that the exclusion of a single litigant's retained technical expert on the basis that he does not add to the safety investigation requires this Court's immediate review.

Petitioner's interpretation of the NTSB's Investigation Manual, NTSB Order 6200.1 A, Investigation Manual-Aircraft Accidents, (April 25, 1980) is erroneous. This manual specifically states:

“The categories of parties [to the field investigation] should be interpreted *as permitting* an owner/operator to participate. . . If they request participation, they or their qualified representative should be permitted participation.

We should always deal with the owner/operator. If he is deceased talk to the legal representative of his estate. When talking to the party representatives, the investigator in charge should bear in mind his obligation to make a decision as to what *type of expertise should be provided*.

The decision must be free of prejudice and not appear capricious. If a nominated consultant is *persona non grata* because of the views of other parties (manufacturer, FAA, etc.) or disliked by

the investigator-in-charge, good cause does not exist for his exclusion. However, if an individual or a private investigator has demonstrated in the past an inability to follow board direction *or makes no contribution to the board's investigative efforts*, the investigator in charge should seek the designation of someone else. [Emphasis Added]."

Contrary to Petitioner's assertion, the above *specifically* provides the investigator-in-charge with the instruction *not* to include any individual who makes *no contribution to the investigative effort*. The Court of Appeal for the Ninth Circuit found that the NTSB had made such a rational decision when it stated therein:

"By contrast, there is nothing unique Appellant's expert could add to the investigation, or so the NTSB could rationally decide." (A-6)

The NTSB's exclusion of Petitioner's representative from participating in certain phases of the investigative effort by the NTSB is neither arbitrary nor capricious as there is a demonstrable rational basis to support it, as shown above by the Court of Appeals for the Ninth Circuit's understanding that the manufacturer of certain technical components provides technical insight, specialized knowledge and specialized facilities geared specifically for that product which reduces the government's and the NTSB's requirements to maintain analytical and testing facilities and personnel. In the instant action, Teledyne's knowledge of its own product could obviously assist the NTSB's staff in the disassembly, testing and analysis of the engines and would indeed reduce the risk that someone from the NTSB's staff might accidentally and needlessly alter or destroy certain components.

II

PETITIONER HAS FAILED TO DEMONSTRATE ANY CONSTITUTIONAL RIGHT THAT SHOULD OVERRIDE THE NTSB'S SAFETY FUNCTION OR MISSION

- A. The Court of Appeals for the Ninth Circuit's decision appropriately determines that there is no significant detriment to Petitioner's right to contribution or indemnification.**

The standard for determining whether governmental regulation or action in an area where public safety is involved is whether or not said regulation or action bears a rational relationship to a legitimate governmental objective. *McGowan v. Maryland*, 81 S.Ct. 1101, 366 U.S. 420, 61 L.Ed. 2d 356 (1961). *Air East, Inc., v. NTSB*, 512 F.2d 1227, 1231 (3d. Cir. 1975), *cert. denied*, 96 S.Ct. 122, 423 U.S. 863, 46 L.Ed. 2d 92 (1975).

NTSB activities minimally infringe upon any and all litigants' and potential litigants' right to indemnification and contribution. Even assuming arguendo that Petitioner enjoys a constitutional right to have its tort liability reduced by indemnification or contribution such a right would extend to every party and entity involved in any civil aircraft accident litigation. By setting forth the specific regulations involved, by publishing the regulations, by providing for access to factual information, the NTSB provides for notice and imparts all technical factual information such that there is a minimal impact on all parties. *Tanner v. McCall*, 441 F.Supp. 503 (1977) *modified in part* 625 F.2d 1183 (1980); *United States v. Dickens*, 695 F.2d 765 (1982); *United Steel Workers of America v.*

Sadlawski, 102 S.Ct. 2339, 437 U.S. 102, 72 L.Ed. 707 (1982); *Miami Herald Publishing Company v. City of Hallandale*, 734 F.2d 666 (1984).

Contrary to Petitioner's assertion, there has been no destruction of physical evidence nor have or would Petitioners, or any potential litigant in this instance be deprived of any physical evidence of the cause of this particular incident. Petitioner, as will all litigants who come forward as a result of this tragic incident, will have access to the NTSB's factual reports in which it records the factual results from the disassembly and testing. 49 C.F.R. Section 8445.50. Further, Petitioner as well as all litigants, may secure the testimony of the investigator who conducted the tests as to the factual evidence they yielded, the procedures utilized and the results thereof. 49 C.F.R. Section 835.3. *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Circuit, 1959); *Kline v. Martin*, 345 F.Supp. 31 (E.D. VA, 1972); *Berguido v. Eastern Airlines, Inc.* 317 F.2d 628, 631 (3rd Circuit, 1962) *cert. denied*, 84 S.Ct. 170, 375 U.S. 895, 11 L.Ed. 2d 124 (1963); *Lobel v. American Airline, Inc.*, 192 F.2d 217 (2nd Circuit, 1951).

The availability of these factual reports generated by the NTSB and its investigators to all parties involved in the civil litigation which arises from such an incident is well known. However, Petitioner's brief fails to establish that such reports exist and further fails to explain why such reports and access to all physical evidence does not meet Petitioner's requirements for evidentiary concerns as well as all other litigants who have the identical vested interest as Petitioner. The ability of the NTSB to complete the safety mission entrusted to it by Congress without concerns extraneous and inconsistent with said mission is adequately

addressed in footnote 10 of the decision by the Ninth Circuit.⁴ (A-9).

B. The Tucker Act provides Petitioner with an appropriate remedy should there be a resultant taking of property.

Contrary to Petitioner's assertion that the NTSB and Teledyne have asserted a right to test and destroy evidence with immunity, neither party has ever asserted such. Rather, this Respondent asserts that as an agent of the NTSB, duly appointed to assist the NTSB in its safety investigation, it may assist the NTSB in their search and

⁴ Footnote 10 of the Court's opinion is:

"Appellant is not the only who can claim a legitimate interest in the NTSB's investigation; presumably the estates of others killed in the Sun Valley Mall crash, as well as those who were injured or suffered property damage, could assert that their rights will be impaired if their representatives are not allowed to observe the teardown. If appellant's claim were sustained on constitutional grounds, it would be difficult to exclude these others. The problem would be infinitely multiplied in a crash involving an airliner where literally hundreds of interested parties may be in the position of having some interest potentially affected by the NTSB's investigation. The NTSB would be rendered entirely ineffective in carrying out its mission if it were required to allow all of these parties access to every critical step of the investigation. The government must be allowed to carry out its responsibilities; if private property is taken in the process, the appropriate remedy is a suit for compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20, 104 S.Ct. 2862, 2882, 81 L.Ed.2d 815 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 688-90, 101 S.Ct. 2972, 2991-92, 69 L.Ed.2d 918 (1981)."

investigation for a cause of this incident. The Court of Appeals for the 9th Circuit adequately addresses the retention, possession, and maintenance of key elements of proof in footnote 9 of its opinion.⁵ (A-8)

⁵ Footnote 9 of the Court's opinion is:

"Appellant has expressed concern that Teledyne may alter or destroy vital evidence. This case, however, is not much different from those where an adverse party retains possession of key elements of proof, e.g., purloined trade secrets, documents proving fraud, or machinery involved in personal injury accidents. The presumptions and sanctions available to punish those who alter or destroy evidence must be considered sufficient to deter any misconduct and Teledyne is no doubt aware that its handling of the materials may come under intense scrutiny. See, e.g., Fed.R.Civ.P. 37; *Alexander v. National Farmers' Org.*, 687 F.2d 1173, 1205-06 (8th Cir. 1982), cert. denied, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983) (inference may be drawn against party destroying documents); *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed.R.Serv.2d 423, 427 (N.D.Ind. 1977) (sanctions appropriate where party destroyed evidence it should have known would be relevant in future litigation). In any case, as we understand the NTSB's procedures, the engines will be handled by Teledyne employees only under the supervision of NTSB investigators."

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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